

STATE OF CALIFORNIA
STATE WATER RIGHTS BOARD

In the Matter of Application 15441
and Permit 10217 (Application 16055)
of Francis G. and Grace Noel and
Application 20265 of Ernest K. Richardson
to Appropriate from Tamarack Flat Creek
and an Unnamed Stream in El Dorado County

ADOPTED APR 4 1963

Decision D 1118

DECISION APPROVING APPLICATION 20265,
DENYING APPLICATION 15441, AND
REVOKING PERMIT 10217 (APPLICATION 16055)

Application 15441 was filed on July 31, 1953, by Francis G. Noel and Grace Noel, his wife, for a permit to appropriate 3,000 gallons per day, year-round, from Tamarack Flat Creek, a tributary of South Fork American River in El Dorado County, for domestic and fire protection purposes. Action on the application was delayed at applicant Noel's request while he attempted to secure right of access from the United States Forest Service and others to construct the necessary diversion and transmission facilities on Forest Service and privately owned lands or, in the alternative, to find another source for a water supply.

On September 20, 1954, Francis G. Noel and Grace Noel filed Application 16055 for a permit to appropriate 3,000 gallons

per day from an unnamed stream tributary to Tamarack Flat Creek. This was intended as a substitute for Application 15441, and Mr. Noel authorized cancellation of the latter as soon as he secured a permit and the necessary rights-of-way for his project under Application 16055. This application was approved and Permit 10217 issued thereon in 1955. Application 15441 was then canceled by the Board on the assumption that it was no longer needed. However, the Noels were unsuccessful in their efforts to obtain permission to pipe water from the unnamed tributary, and finally, on September 12, 1960, Mr. Noel petitioned the Board for permission to move the point of diversion to Tamarack Flat Creek at or near the point that had been described in Application 15441. He also petitioned for an extension of time within which to complete construction and put the water to use. Upon Noel's request, the Board reinstated Application 15441 so as to give him the advantage of its earlier priority, since its cancellation had been unauthorized and inadvertent.

Application 20265 was filed on June 16, 1961, by Ernest K. Richardson for a permit to appropriate 0.05 cubic foot per second, year-round, for domestic purposes from the same unnamed tributary to Tamarack Flat Creek as that described in Application 16055.

Protests and Hearing

Protests against the approval of Application 15441 and against the petition for change under Application 16055

were received from Ernest K. Richardson, Ralston Trail Subdivision, Mount Ralston Subdivision and Mount Ralston Subdivision No. 1, and, in addition, the petition was protested by the Northern California Conference of Seventh Day Adventists. A protest against the approval of Application 20265 was received from Francis G. Noel. After due notice, a public hearing was held in Sacramento on June 7, 1962, conducted by Kent Silverthorne, Chairman, and Ralph J. McGill, Member, of the State Water Rights Board. Applicants and protestants appeared and submitted evidence.

The Noel Project

In 1951, Francis G. Noel and Grace Noel purchased a 0.27-acre parcel of land from Ernest K. Richardson. It was part of a larger tract formerly owned by William Dreher. This tract is traversed by Tamarack Flat Creek and is supplied with domestic water from a diversion dam across the creek. A pipeline from the dam distributes the water to the various lots into which the tract has been subdivided and also supplies adjacent lands that were retained by Dreher. The deed from Dreher granted one-half of the water carried by the main pipeline to Richardson who agreed to maintain and keep in repair the water system.

Soon after Noel's purchase of his land, he constructed a building which included eight bedrooms, five bathrooms, a dining room, and kitchen, which was to be used as a youth camp. The structure can accommodate as many as 40 people. Mr. Noel testified that he has been prohibited from operating a youth

camp except on a limited scale by the State Department of Health until he enlarges his water supply to a capacity of 3,000 gallons per day for fire protection (RT 16). For this purpose, in 1951, he installed a 2-inch line across his land to the house, but this is fed by a 1-inch pipe from the 4-inch main to the boundary of his land (RT 38-39). He plans to replace the small line with a 2-inch pipe after he receives a permit from the Board (RT 39). He testified that this would not result in his using more water but would permit having more water available at a higher rate in case of fire (RT 34, 55) and would also increase the water pressure (RT 49). He stated that the present pipeline "is sufficient for water when the water is available." According to Noel, sufficient water is not now available because mud has filled in behind the diversion dam (RT 38), resulting in mud, dirt, and debris clogging up the line (RT 43). However, he also testified that he filed Application 15441 in order to get more water (RT 21, 50).

The point of diversion named in Application 15441 is to be at the existing Richardson Dam across Tamarack Flat Creek, and the water is to be conveyed through the existing system. Noel does not contemplate any additional construction other than to clean out and improve the diversion works and substitute a 2-inch pipe for the 1-inch line from the main to his property (RT 21).

The dam is on government-owned land in the Eldorado National Forest. A special use permit has been issued to Richardson who claims ownership of the water system (RT 73).

Noel is presently supplied with water through the Richardson system which serves all of the lots within the original Dreher tract. He claims a right to this supply which is apparently appurtenant to his land and came to him as purchaser of the land from Richardson. The present water supply is no more than sufficient for present demand, and at times there have been shortages (RT 74). In order to supply more water to Noel without depriving other users of their water, the capacity would have to be increased, either by improving the diversion works at the Richardson Dam or by increasing the size of the main pipe, or both. Noel proposes the former, but he has no legal right so far as the record shows to accomplish the necessary improvements and testified that it should be a cooperative endeavor among all the water users (RT 94). This is undoubtedly true, but Noel's attempts to secure water rights for his own use through the community system have apparently not inspired the necessary confidence and cooperation of his neighbors (RT 73). He claims an existing easement across lands of others for the 1-inch pipeline that supplies water to his land from the 4-inch main and asserts the right to substitute a 2-inch line. However, he has refrained from doing so because of lack of a permit from the Board. In this he misconceives the nature of such a permit. The Board has no jurisdiction to authorize him to install a new pipeline. Such authority depends solely upon his easement, and if it is sufficient, he can proceed without a permit from the Board so long as he does not take more water than he is entitled to receive from the system.

Noel asserts that he filed the applications because he was required to show availability of 3,000 gallons per day for fire protection in order to operate a youth camp. There is no indication in the record that in case of fire he would not be permitted to use all the water available from the system in order to extinguish it. Under the circumstances, such permission would scarcely be refused, since all concerned would have a common interest in protecting their property from the spread of fire.

In portions of his testimony Noel stated that the only reason for filing Application 15441 was because he had been advised to do so by Mr. Dreher due to the fact that the former point of diversion for the water system had been moved upstream about 600 feet (RT 12, 30, 33). There is no explanation in the record for this advice. Apparently, the original diversion had been under claim of riparian right. In 1942, Richardson filed Application 11264 to cover service of water through the system from the present point of diversion to the tract he had purchased. He received a permit in 1947 authorizing a diversion of 0.05 cfs, or about 32,500 gallons per day. Richardson also holds a permit issued on Application 15623 authorizing diversion of 0.04 cfs from the same place.

Noel also suggested as a reason for wishing to receive a permit from the Board that Richardson contemplated selling the water system, and Noel wants to protect his investment "and the water" (RT 35, 36, 51). It does not appear that a sale by Richardson could divest Noel of his present entitlement.

Whatever reason Noel may have had for filing the applications, since he does not operate the system nor have a right to divert water through it except as the owner of a lot and in common with other owners served from the same supply, Application 15441 should not be approved. The proper solution for his problem is to clean out and improve the present diversion works through cooperative effort by all those who are dependent upon them. It does not appear that additional permits from the Board are necessary or appropriate.

By petitioning for permission to change the point of diversion under Permit 10217 from the unnamed tributary of Tamarack Flat Creek to the Richardson Dam, the permit becomes merely a substitute for Application 15441, and the same reasons for disapproval of the application apply to the petition. The same would be true even if Noel abandoned the change in point of diversion, because water from the unnamed tributary would be conveyed first to the Richardson Dam and then through the existing system to Noel's property (RT 90). Although the permit was issued more than seven years ago, no work has been done toward perfecting an appropriation because of the access problem. No means have been found to solve the problem, and apparently no solution is in sight. The request for further time within which to complete construction and use under the permit should be denied, and the permit should be revoked.

Application 20265

The reasons for rejection of Application 15441 and revocation of Permit 10217 do not apply to Application 20265, as Richardson holds a special use permit from the Forest Service and is in possession of the existing diversion works. There is no bar to the appropriation proposed by this application which is to be used to create a supplemental supply for the subdivision. The evidence indicates that there is unappropriated water available in the unnamed stream, and the Board so finds. Flow in the stream does not contribute to the American River during the summer season.

The Board concludes that Application 20265 should be approved and that a permit should be issued to the applicant subject to limitations and conditions set forth in the following Order.

ORDER

IT IS HEREBY ORDERED that Application 20265 be, and the same is, approved, and that a permit be issued to the applicant, subject to vested rights and to the following limitations and conditions:

1. The amount of water appropriated shall be limited to the amount which can be beneficially used and shall not exceed 0.05 cubic foot per second by direct diversion, year-round.

2. The maximum amount herein stated may be reduced in the license if investigation warrants.

3. Actual construction work shall begin on or before September 1, 1963, and shall thereafter be prosecuted with reasonable diligence, and if not so commenced and prosecuted, this permit may be revoked.

4. Construction work shall be completed on or before December 1, 1965.

5. Complete application of the water to the proposed use shall be made on or before December 1, 1966.

6. Progress reports shall be filed promptly by permittee on forms which will be provided annually by the State Water Rights Board until license is issued.

7. All rights and privileges under this permit, including method of diversion, method of use, and quantity of water diverted are subject to the continuing authority of the State Water Rights Board in accordance with law and in the interest of the public welfare to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

8. Permittee shall allow representatives of the State Water Rights Board and other parties, as may be authorized from time to time by said Board, reasonable access to project works to determine compliance with the terms of this permit.

IT IS FURTHER ORDERED that Application 15441 and the petitions for change in the point of diversion and for extension of time to commence construction pursuant to Permit 10217 (Application 16055) be, and the same are hereby, denied.

IT IS FURTHERED ORDERED that Permit 10217 be, and the same is, hereby revoked.

Adopted as the decision and order of the State Water Rights Board at a meeting duly called and held at California, on the day of , 1963.

Kent Silverthorne, Chairman

Ralph J. McGill, Member

W. A. Alexander, Member